

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of

EchoStar Communications Corporation, (a Nevada
Corporation), General Motors Corporation: and
Hughes Electronics Corporation (Delaware
Corporations)

(Transferors)

and

EchoStar Communications Corporation (a
Delaware Corporation)

(Transferee)

DOCKET FILE SHOW ORIGINAL

CS Docket No. 01-348

To: Chief Administrative Law Judge Richard L. Sippel

OPPOSITION TO MOTION TO DELETE AND CLARIFY ISSUES

The Word Network (hereinafter "Word"), by and through counsel and pursuant to Sections 1.229 (d) and 1.294(c)(1) of the Commission's Rules, 47 CFR §§ 1.229 (d) and 1.294(c)(1), hereby files an Opposition to Motion to Delete and Clarify Issues. In support, the following is shown:

1. By Hearing Designation Order, (FCC 02-284, released October 18, 2002) (hereinafter "HDO"), the Commission designated the above-captioned matter for hearing on the following issues:

Issue 1: Whether the proposed transaction is likely to cause anticompetitive harm. In reaching a determination on this issue, as outlined above, the following should be considered:

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(a) the product market (*e.g.*, whether the relevant market is MVPD service, DBS service, or some other subset of MVPD service)(*see* paras. 106-116);

(b) the geographic market (*e.g.*, whether the proper geographic market is local, and whether, for purposes of analysis, **the** relevant geographic markets should be aggregated into three categories - markets not served by any cable system; markets served by low-capacity cable systems; markets served by high-capacity cable systems; and the relative number of households in each of these categories) and the number of subscribers per market (*see* paras. 117 - 125);

(c) the market participants, market shares and concentration (*see* paras. 126 - 139);

(d) the timeliness: likelihood, and sufficiency of entry to offset any potential adverse competitive effects that may result from the proposed transaction (**see** paras. 140- 150);

(e) the effects of the proposed transaction on price, quality and innovation (considering the likelihood of coordinated behavior among competing firms and the ability of the Applicants to unilaterally take anticompetitive actions) (*see* paras. 151 - 177);

(f) the efficacy, potential harms, and potential benefits of Applicants' proposed national pricing plan (*see* paras. 178 - 187);

(g) the proposed transaction's effect on the ability of multichannel video programmers to reach certain niche audiences (*see* paras. 248 - 256); and

(h) any conditions proposed by the Applicants.

Issues 2: Whether the proposed transaction is likely to cause other public interest harms. In reaching a determination on this issue, the following should be considered:

(a) the proposed transaction's effect on viewpoint diversity (*see* paras. 42 - 43, 49 - 51 and 55); and

(b) the proposed transaction's effect on the Commission's spectrum policies (*see* paras. 83 - 96).

Issue 3: Whether the proposed transaction is likely to yield any public interest benefits. In reaching a determination on this issue, as outlined above, the following should be considered:

(a) whether the cost savings and other benefits claimed by Applicants are non-

speculative, credible and transaction-specific and are likely to flow through to the public (*see* paras. 188 - 217); and

(b) whether the proposed transaction's impact on the provision of Internet access service via satellite is likely to be beneficial or harmful. (*see* paras. 218 - 247).

Issue 4: On balance, whether the public interest, convenience and necessity would be served by a grant of the above-captioned application and the joint application submitted by EchoStar and Hughes requesting authority to launch and operate NEW ECHOSTAR 1, a direct broadcast satellite that would be located at the 110° W.L. orbital location.

HDO. ¶ 289.

2. On November 27, 2002, EchoStar Communications Corporation ("EchoStar") General Motors Corporation ("GM") and Hughes Electronics Corporation ("Hughes") (collectively the "Applicants") filed a Motion to Delete and Clarify Issues. The Applicants note that an amendment to their applications has been concurrently filed and they contend that this amendment obviates the need for a hearing altogether.¹ The Applicants also note that they have filed a petition to suspend the hearing with the Commission so that the Commission can take the amendment into account in revisiting the designation order. Finally, the Applicants contend that even if the Commission denies their request to suspend the hearing, there is no need for the Presiding Officer to conduct a hearing since, in their view, the amendment and other factors render all of the designated issues moot. Consequently, they ask the Presiding Judge, in the event the Commission does not suspend the hearing or, having suspended the hearing,

¹ Although the Applicants contend that the concurrently filed amendment obviates the need for a hearing altogether (Motion, p. 2), the instant motion only seeks deletion of Issues 1(a), 1(b), 2(a), and 2(b), above (*see* Motion, n. 2) and clarification of Issue 3 (Motion, pp. 15, 16).

subsequently reinstates it. to delete four² of the issues and clarify another.³

3. As the Chief Administrative Law Judge has already ruled, the appropriate and most efficient course of action for the Applicants is to file their request for suspension of hearing pending review of an amended application directly with the Commission. Procedural Order, FCC 02M-106, released November 26, 2002. The Commission will then determine whether the hearing should be suspended at this time and what effect, if any, the amendment will have on the issues currently specified in the Hearing Designation Order. Consequently, the relief sought, deletion and/or clarification of issues, is premature since the Commission must first act on the impact of the amendment before the Presiding Judge can delete or modify issues. Moreover, even if the Commission suspends the hearing and subsequently reinstates the issues set forth in the Hearing Designation Order, the Applicants' motion is premature and requests the Presiding Judge to act beyond his authority.

4. The Commission has long held that subordinate officials may not add, delete or modify issues specified in a Hearing Designation Order where the Designation Order contains a reasoned analysis of the matters serving as a basis for such action. *Atlantic Broadcasting Company*, 5 FCC Rcd 717, 720-21 (1966). This proposition has been emphatically and repeatedly stated, *i.e.* :

² The Applicants contend that there is no need for the Presiding Judge to conduct a hearing to determine: (1) the product market; (2) the geographic market and the number of subscribers per market; (3) the transaction's effect on viewpoint diversity; and (4) the transaction's effect on the Commission's spectrum policies (Issues 1(a), 1(b), 2(a), and 2(b)).

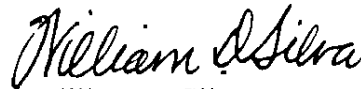
³ The Applicants contend that the Presiding Judge should clarify Issue 3 to eliminate consideration of whether a joint venture or other joint operating alternative is likely to yield any public interest benefits.

It is “black-letter law” [that] “where there has been a thorough consideration of a particular question in the designation order,” subordinate officials such as presiding hearing officials, or even the Board, may not reconsider the matter or take any action inconsistent with the designation order.

Algreg Cellular Engineering, et al., 9 FCC Rcd 5098, ¶ 37 (Rev. Bd. 1994). See also, *Ft. Collins Telecasters*, 103 FCC 2d 978, 983-84 (Rev. Bd. 1986), *review denied* 2 FCC Rcd 2780 (1987), *aff'd by judgment*, 841 F.2d 428 (D.C. Cir. 1988); and *Newton Television, Ltd.*, 3 FCC Rcd 553, 557 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 2561 (1989). It remains to be seen whether the Commission will thoroughly consider what impact, if any, the Applicants’ amendment will have on the designated issues,⁴ but only absent such thorough consideration can the Presiding Judge grant the relief sought by Applicants. Accordingly, the Motion to Delete and Clarify Issues should be denied.

Respectfully submitted.

THE WORD NETWORK



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⁴ It is also highly unlikely that the Commission will fail to thoroughly consider the impact of the amendment on the Designated Issues in light of the very thorough and lengthy Hearing Designation Order, unless it were *to* find that the Applicants lacked good cause to amend their application, a ruling which the Presiding Judge could not revisit in any event (47 CFR §§ 1.106(a) and 1.115(e)(3)).

CERTIFICATE OF SERVICE

I, William D. Silva, hereby certify that true and correct copies of the foregoing
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first class mail, postage prepaid on this 9th day of December 2002 :

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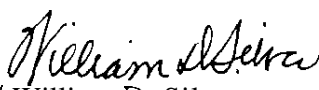
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